

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

RE: GERARD L. & ANTOINETTE BUCCI AAD NO. 92-022/IE
NOTICE OF VIOLATION NO. ISDS CI92-232

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to the Respondents' request for hearing on the Notice of Violation and Order ("NOV") issued by the Division of Groundwater and ISDS ("Division") on November 23, 1992. On October 7, 1994 the parties requested that the hearing scheduled for October 11, 12 and 13, 1994 be cancelled as they had agreed, pursuant to Rule 15.00 of the Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD Rules"), to waive the hearing and submit the case for decision upon the record. AAD Rule 15.00 provides that submission of a case without a hearing does not relieve the parties from the necessity of providing the facts supporting their burdens, allegations or defenses.

By Order dated October 11, 1994, the hearing was cancelled and the parties were given a deadline for submission of a statement of agreed upon facts as well as to stipulate which of those documents presented at the prehearing conference that had been marked for identification were to be admitted as full exhibits. Division and Respondents filed their Stipulation of Parties on November 7, 1994, which is

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attached hereto as Appendix A, but made no changes as to the status of the exhibits offered at the prehearing conference. Appendix B contains stipulations which the parties had agreed to at the prehearing conference. The exhibits are identified on Appendix C.

Respondents' Memorandum of Law was filed with the AAD on November 15, 1994. The Division's Memorandum of Law was filed on November 16, 1994.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division (R.I.G.L. Section 42-17.7-1 et seq), the Administrative Procedures Act (R.I.G.L. Section 42-35-1 et seq, the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters, and the Rules and Regulations for Assessment of Administrative Penalties, May 1992 ("Penalty Regulations").

LIABILITY

On November 23, 1992 the Department of Environmental Management issued a Notice of Violation and Order to Gerard L. and Antoinette Bucci alleging violations on two occasions-- June 16, 1992 and September 28, 1992--of SD 2.08 of the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems ("ISDS Regulations") on property

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located at 747 Bald Hill Road, Warwick, Rhode Island,
otherwise identified as Warwick Assessor's Plat 262, Lot 184.

SD 2.08 provides in pertinent part:

Discharge on or to the Surface of the
Ground - No person shall discharge or
permit the overflow or spillage of any
treated or untreated sanitary sewage on
or to the surface of the ground unless
permitted by the Director...

In the NOV, the Division issued an Immediate Compliance
Order, which is not appealable to the AAD, and required
Respondents to address the source of the alleged discharge.
The Division also sought an administrative penalty in the
amount of Two Thousand (\$2,000.00) Dollars. Respondents
requested a hearing and have asserted that the proposed
penalty is excessive and improper.

In the attached Appendix A, the Division stipulated to
the release of the violation and penalty for the discharge of
sewage alleged to have occurred on September 28, 1992. The
Division therefore now seeks the imposition of the reduced
penalty of One Thousand (\$1,000.00) Dollars for the remaining
violation alleged to have occurred on June 16, 1992.

By way of other stipulations set forth in Appendix A,
Respondents have admitted to ownership of the subject property
on June 16, 1992 and that they discharged or permitted the
overflow or spillage of sanitary sewage onto the surface of
the ground from the individual sewage disposal system on said

date without a permit from the Director.

A violation of SD 2.08 of the ISDS Regulations has therefore been established.

ADMINISTRATIVE PENALTY

As cited by counsel for the Division, Section 12(c) of the Penalty Regulations states:

In an enforcement hearing the Director must prove the alleged violation by a preponderance of the evidence. Once a violation is established, the violator bears the burden of proving by a preponderance of the evidence that the Director failed to assess the penalty and/or the economic benefit portion of the penalty in accordance with these regulations.

The existence of the June 16, 1992 violation has been established through the stipulated facts, thereby satisfying the Division's obligation to prove the violation as required by Section 12(c). As a result, the burden shifts and Respondents must prove that the One Thousand (\$1,000.00) Dollar penalty was not assessed in accordance with the Penalty Regulations.

Respondents' case rests solely upon the arguments set forth in Respondents' Memorandum of Law. In the Memorandum, counsel cites the provisions of R.I.G.L. Section 42-17.6-6, which sets forth the factors to be considered by the Director in determining each administrative penalty:

42-17.6-6. Determination of administrative penalty.--In determining the amount of each administrative penalty, the director shall include, but

not be limited to, the following to the extent practicable in his or her considerations:

- (a) The actual and potential impact on public health, safety and welfare and the environment of the failure to comply;
- (b) The actual and potential damages suffered, and actual or potential costs incurred, by the director, or by any other person;
- (c) Whether the person being assessed the administrative penalty took steps to prevent noncompliance, to promptly come into compliance and to remedy and mitigate whatever harm might have been done as a result of such noncompliance;
- (d) Whether the person being assessed the administrative penalty has previously failed to comply with any rule, regulation, order, permit, license, or approval issued or adopted by the director, or any law which the director has the authority or responsibility to enforce;
- (e) Making compliance less costly than noncompliance;
- (f) Deterring future noncompliance;
- (g) The financial condition of the person being assessed the administrative penalty;
- (h) The amount necessary to eliminate the economic advantage of noncompliance including but not limited to the financial advantage acquired over competitors from the noncompliance;
- (i) Whether the failure to comply was intentional, willful, or knowing and not the result of error;
- (j) Any amount specified by state and/or federal statute for a similar violation or failure to comply;
- (k) Any other factor(s) that may be relevant in determining the amount of a penalty, provided that the other factors shall be set forth in the written notice of assessment of the penalty; and
- (l) The public interest.

He contends that the penalty should be waived pursuant to several paragraphs of the statute: that the "grey water" which was discharged contained only animal fat and other dairy waste and, under paragraph (a), the actual potential impact on public health and safety was not of immediate concern; that, beginning immediately following the overflow, Respondent worked with officials in the City of Warwick to ensure that sewers would be constructed with an expected connection to the site in Spring 1995; that they have had the septic system pumped and the waste removed to the Warwick Sewage Treatment Plant and will continue to do so until sewers are installed; that the above demonstrates that Respondents intend future compliance with the ISDS Regulations and therefore the Director need not consider paragraph (f), "Deterring future noncompliance"; that Respondents' failure to comply with the Regulations was not intentional or the result of "knowing error" and therefore should be weighed under paragraph (i); and that, pursuant to paragraph (g), the financial condition of Respondents--that they are not wealthy individuals and have incurred expenses to ensure there are no future problems--should be considered.

In contrast, the Division's Memorandum asserts that Respondents were notified of the June 16, 1992 overflow on June 24, 1992 and took no action to repair the ISDS between June 24th and November 23, 1992 when the NOV was issued.

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Division's counsel maintains that, as of the date of the Division's Memorandum, Respondents had still not taken any permanent remedial measures to prevent further overflows. It is the Division's position that Respondents have not submitted any evidence to prove that the Director failed to assess the penalty in accordance with the Department's Penalty Regulations.

I note that none of the documents offered by Respondents at the prehearing conference have been admitted as full exhibits nor have Respondents submitted any supporting documents with their Memorandum. What remains to be considered is whether the arguments set forth in Respondents' Memorandum constitutes evidence to be weighed in determining if the penalty was properly assessed.

Section 42-35-10 of the Administrative Procedures Act provides in pertinent part:

...The rules of evidence as applied in civil cases in the superior courts of this state shall be followed; but, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be submitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs...

Although this section may arguably allow consideration of some types of reliable hearsay in contested cases, the Rhode Island Supreme Court has clearly indicated that arguments similar to those made by Respondents cannot be considered as

evidence. In Wood v. Ford, 525 A.2d 901, 903 (R.I. 1987), the Court stated:

...statements of counsel made in the course of argument, whether written or oral, do not constitute evidence, regardless of the form in which they are presented.

The Court concluded that an administrative agency may not base a finding or determination on information that is not legally probative. at 903. See Rhode Island Consumer's Counsel v. Smith, 111 R.I. 271, 302 A.2d 757 (1973).

In consideration of the above, I find that the Respondents have presented no evidence to warrant a reduction or waiver of the penalty and have not met their burden of proving that the Director failed to assess the penalty in accordance with the Penalty Regulations.

Accordingly, the assessment of an administrative penalty in the amount of One Thousand (\$1,000.00) Dollars is affirmed.

Wherefore, after considering the arguments of counsel, the documentary evidence of record and the stipulations of the parties which are herewith incorporated in this Decision, I make the following:

FINDINGS OF FACT

1. The Respondents are the owners of the real property located at 747 Bald Hill Road in Warwick, Rhode Island, and were the owners of this property on June 16, 1992.
2. On or about June 24, 1992, a Notice of Intent to Enforce was mailed to Respondents by the Department of Environmental Management, Division of Groundwater and ISDS.

3. A Notice of Violation, numbered CI92-232 and dated November 23, 1992, was issued by the Department; served upon the Respondents; and recorded with the Office of Land Evidence in the City of Warwick.
4. The Notice of Violation was received by the Respondents and the Respondents filed a request for an administrative hearing.
5. On June 16, 1992, the Respondents discharged or permitted the overflow or spillage of sanitary sewage onto the surface of the ground from the individual sewage disposal system on Respondents' property without a permit from the Director.
6. The Division of Groundwater and ISDS has agreed to the release and discharge of the violation and penalty for the alleged discharge of sanitary sewage on the Respondents' property on September 28, 1992.
7. The assessment of an administrative penalty in the sum of One Thousand (\$1,000.00) Dollars is not excessive.

Based upon the foregoing facts, the stipulations of the parties, and the documentary evidence of record, I make the following

CONCLUSIONS OF LAW

1. Respondents made a timely request for hearing in accordance with R.I.G.L. Sections 42-17.1-2(u) (1) and 42-17.6-4.
2. Respondents have admitted that on June 16, 1992 they were in violation of Section SD 2.08 of the ISDS Regulations.
3. Respondents have failed to prove by a preponderance of the evidence that the administrative penalty was not assessed in accordance with the Penalty Regulations.
4. The Department is entitled to an administrative penalty in the amount of One Thousand (\$1,000.00) Dollars.

Wherefore, it is hereby

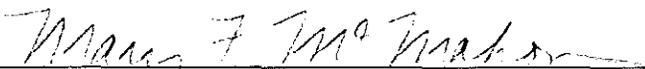
ORDERED

1. The administrative penalty in the amount of One Thousand (\$1,000.00) Dollars is assessed, jointly and severally, against each named Respondent.
2. Respondents shall, within ten (10) days after the Final Agency Order is signed by the Director, pay the administrative penalty by certified check, made payable to the "General Treasurer, State of Rhode Island" and send it to:

Rhode Island Department of Environmental Management
Attention: Robert Silvia
Office of Business Affairs
22 Hayes Street
Providence, Rhode Island 02908

3. The violation and penalty for the alleged discharge of sanitary sewage on the Respondents' property on September 28, 1992 is released and discharged.

Entered as an Administrative Order this 23rd day of March, 1995 and herewith recommended to the Director for issuance as a Final Agency Order.


Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

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Entered as Final Agency Order this 31st day of March,
1995.

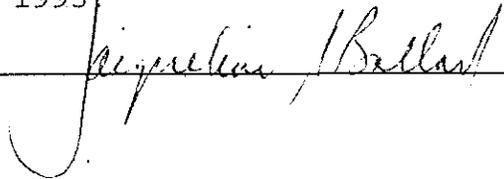


Timothy R. E. Keeney
Director
Department of Environmental Management
9 Hayes Street
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within
order to be forwarded, via regular mail, postage prepaid to
John J. Flanagan, Esq., P. O. Box 1340 West Warwick, RI 02893
and via interoffice mail to John A. Langlois, Esq., Office of
Legal Services, 9 Hayes Street, Providence, RI 02908 on this
3rd day of ~~March~~, 1995.

April



APPENDIX B

STIPULATION OF THE PARTIES

Pursuant to the prehearing conference conducted on August 12, 1994, the parties agreed to the following stipulations of fact (as they are set forth in the Prehearing Conference Record and Order entered on August 18, 1994):

1. The Respondents are the owners of real property located at 747 Bald Hill Road in Warwick, RI which is the subject matter of this hearing.
2. On or about June 24, 1992 and October 7, 1992, Notices of Intent to Enforce were mailed to Respondents by the Department.
3. A Notice of Violation, numbered CI92-232 and dated November 23, 1993 was issued by the Department; served upon the Respondents; and recorded with the Office of Land Evidence in the City of Warwick in accordance with all statutory and regulatory requirements.
4. The Notice of Violation was received by the Respondents and the Respondents filed a request for an administrative hearing.
5. The Regulation allegedly violated by the Respondents is:
 - (a) SD 2.08, relating to the discharge of sanitary sewage onto the surface of the ground.
6. The Division has jurisdiction over the Respondents pursuant to Rhode Island General Laws §42-17.1-2 et seq.

APPENDIX C
LIST OF EXHIBITS

The below-listed documents are marked as they have been admitted in this proceeding:

- Div. 1 for Id Copy of June 16, 1992 inspection report with attached photos;
- Div. 2 for Id Copy of September 28, 1992 inspection report with attached photos;
- Div. 3 Full Copy of the Notice of Intent to Enforce dated June 24, 1992;
- Div. 4 Full Copy of the Notice of Intent to Enforce dated October 7, 1992;
- Div. 5 Full Resume of Russell J. Chateauneuf;
- Div. 6 Full Resume of Nicholas Capezza;
- Div. 7 Full Copy of the Notice of Violation and Order from the Department dated November 23, 1993;
- Div. 8 Full Copy of Respondents' Hearing Request;
- Div. 9 Full Copy of warranty deed to Respondents dated April 28, 1987;
- Div. 10 Full Copy of plat map showing subject property;
- Resp. 1 for Id Resolution of the City Council of the City of Warwick, August 19, 1993.
- Resp. 2 for Id August 30, 1993 letter of the Warwick Sewer Authority to Mr. Thomas Bucci.
- Resp. 3 for Id May 10, 1993 correspondence between Dennis Vinhateiro, Executive Director, Warwick Sewer Authority and Russell J. Chateauneuf, Department of Environmental Management.